No. 76-1555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

BASIN, INC., *Petitioner*

vs.

FEDERAL ENERGY ADMINISTRATION, *Respondent*

Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

CECIL E. MUNN
1800 First National Bank Building
Fort Worth, Texas 76102

NORTHCUTT ELY
Watergate Six Hundred Building
Washington, D.C. 20037
Counsel for Petitioner

May 9, 1977

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

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CITATIONS

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BASIN, INC., *Petitioner*

vs.

FEDERAL ENERGY ADMINISTRATION, *Respondent*

Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

Petitioner prays that a writ of certiorari issue to review the March 7, 1977, judgment of the Temporary Emergency Court of Appeals (TECA), reversing and rendering the October 22, 1976, judgment of the United States District Court for the Western District of Texas, San Antonio Division.

OPINIONS BELOW

Three opinions were delivered by the courts below. Each is printed in the separately bound appendix to this petition for ease of reference by the Court. Citations follow:

(1) Basin, Inc. v. FEA, 534 F.2d 324 (TECA April 12, 1976).

(2) Basin, Inc. v. FEA, ____ F.Supp. ____, 4 CCH, Energy Management ¶ 26,063 (USDC, W.D. Tex., S.A. Div., October 22, 1976).

(3) Basin Inc. v. FEA, ... F.2d........., 4 CCH, Energy Management ¶26,071 (TECA March 7, 1977, reh.den. April 18, 1977).

JURISDICTION

The judgment of TECA was entered on March 7, 1977, and rehearing denied on April 18, 1977.

The jurisdiction of this Court is invoked under § 211(g) of the Economic Stabilization Act of 1970, 12 USC 1904 note, which by express statutory provision applies to judicial review of regulations issued under the Emergency Petroleum Allocation Act of 1973, 15 USC 754.

QUESTION PRESENTED

Whether, given the statutory standard for judicial review, the court properly enjoined application to petitioner of a freeze action of the FEA which, from admittedly adequate evidence, the court determined is "arbitrary, capricious and an abuse of discretion in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so" and by which, if continued, "in all likelihood [petitioner] will be forced out of business".

A 3 judge TECA panel in April, 1976, said "yes"; the reviewing district court in October, 1976, said "yes"; a different 3 judge TECA panel in March, 1977, said "no".

STATUTES AND REGULATION INVOLVED

Administrative Procedure Act, 5 USC 706(2):

> "**Scope of review** . . . The reviewing court *shall*—(2) hold unlawful and set aside agency action . . . found to be—(A) **arbitrary, capricious**, an **abuse of discretion**, or otherwise not in accordance with law."[1]

Economic Stabilization Act of 1970, 12 USC 1904 note:

> "§. 211. **Judicial review**
>
> "(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder . . . ."
>
> * * *
>
> "(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was **arbitrary** or **capricious**, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code. . . ."
>
> * * *
>
> "(2) A district court of the United States or the Temporary Emergency Court of Appeals may *enjoin* temporarily or permanently the *application of a particular regulation* or order issued

[1]For assistance to the Court we have added emphasis as appropriate in quotations throughout this petition and the appendix.

under this title *to a person who is a party to litigation before it.*"

Emergency Petroleum Allocation Act of 1973, 15 USC 754:

> ". . . . sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; . . ."

FEA Freeze Regulation, 10 CFR 211.63(b)(1):

> "All supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976, shall remain in effect for the duration of this program; . . . ."[2]

[2]The original freeze date was December 1, 1973. By amendment of February 18, 1976, 41 F.R. 7386, the date was changed to January 1, 1976, but this had no substantive effect because petitioner had been frozen away from supplies by a regulation in effect at all times (or retroactively made so) between those dates.

STATEMENT

Petitioner is a small independent crude oil marketing company (only about 20 employees).[3] It was organized in October 1973. By December 1, 1973, petitioner had crude oil supply commitments of approximately 1,000,000 barrels per month.

On January 14, 1974, without any published notice of intention to do so, FEA issued a "freeze rule" which immediately deprived petitioner of 75% of those supply commitments (App. 10). Further it effectively froze petitioner, and any other would-be newcomer, away from practical access to all sources of supply. It locked out all new competition.

Petitioner ran the *administrative* gantlet seeking relief. FEA privately and publicly recognized the injustice, made a lame effort or two to correct it but did not do so.

[3]Crude oil marketing is a highly specialized industry — not to be confused with mere brokering. FEA's answer admits the accuracy of the following description from par. 14 of the Amended Complaint in the district court:

> "The industry is a lawful one, and provides valuable crude oil marketing services to crude oil producers, including the calibration and gauging of producers' field stock tanks; the providing of tank calculation tables; measurement of recovered crude oil; adjustment of crude oil measurements for temperature, gravity and basic sediment and water content; preparation of run tickets on which payments are made; examination of title to producers' leases; determination of names, addresses and current decimal interests of all working interest, royalty interest and overriding royalty interest under the producer's lease; preparation and circulation of necessary division orders; filing of State Commission production and purchase reports; payment of state severance and other taxes; distribution of net proceeds among the various interest owners; and the providing of a market and transportation (usually by trucking) for crude oil from remote production areas to the ultimate refinery."

Petitioner sought *judicial* review by the procedure which Congress had prescribed (*supra* p. 3). In their Answer to Amended Complaint, ¶ 56, "Defendants admit that plaintiff has exhausted its administrative remedies.[4]

On October 6, 1975, the district court, on the basis of a full day's evidentiary hearing, issued a preliminary injunction. FEA immediately appealed to TECA. Before the appeal was heard FEA changed the posture of the controversy by amending the freeze rule and stated it was considering further amendments. For that reason, TECA remanded the case, explaining:

> "Because of the changed posture of this controversy, we shall vacate the preliminary injunction and remand the cause to the district court for further consideration consistent with this opinion. . . . We believe an *expedited hearing* would be appropriate in order to enable the district court *to determine promptly the relevant facts* . . ." (App. 7).

Further in that opinion TECA gave to the district court these explicit instructions to govern its judicial review:

> **"Certainly, any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances."** (App. 6).

* * *

[4]Frank Zarb, FEA Administrator, was a party but has since resigned that position so is not named in the caption in this petition.

> "Basin has strongly represented to us that the relationships, pressures and economic interests in the oil industry are such as to make this formal broadening of its access to producers practically meaningless. *We view this issue as involving relevant questions of fact* concerning Basin's present supply and its allegedly futile efforts to enlarge its supply that can *most appropriately be resolved* through an evidentiary hearing *in the district court.*" (App. 4).

The trial proceeded. The judicial review was careful and thorough. It consumed almost two weeks. Both sides presented their proof in elaborate detail. The court analyzed the evidence and made comprehensive findings and conclusions from it (App. 8-19). And it granted this specific relief (App. 20):

> "IT IS ORDERED AND ADJUDGED
> "that 10 C.F.R. §211.63 as it now exists: (a) effectively eliminates recent comers from the domestic crude oil marketing business and there are no compelling circumstances to justify that elimination, and (b) contravenes the Congressional mandate set forth in 15 U.S.C. §753(b)(1), and (c) as to new entrants to the crude oil marketing business, does not constitute an allocation of crude oil but rather is a total denial of access to crude oil to them, and (d) is **arbitrary, capricious,** and an **abuse of discretion,** and (e) is therefore invalid, unlawful, null and void.
>
> "IT IS FURTHER ORDERED and ADJUDGED "that the Defendants should be, and they hereby are, permanently enjoined from enforcing or executing 10 C.F.R. §211.63 *against the Plaintiff.*"

FEA again appealed to TECA. This time a different 3 judge panel heard the case.[5] It reversed and rendered judgment for the FEA — in spite of the detailed determinations of the reviewing district court, *none of which TECA held to be unsupported by adequate evidence.*

After critical scrutiny the district court found the governmental freeze to have the precise effect which TECA's directions had said could be "justified only by a clear showing of compelling circumstances":

> "The freeze rule, as last amended by the FEA on June 11, 1976, and as in effect at all times since January 14, 1974, has effectively eliminated relatively recent comers — including Basin — from the crude oil marketing business." (App. 15).

Likewise the district court determined that that situation was continuing and would probably be fatal to petitioner:

> "If the freeze rule as presently constituted remains in effect, in all likelihood, **Basin will be forced out of business,** and the entry of **any newcomer** into the crude oil marketing business **will be effectively foreclosed."** (App. 16).

The district court specifically considered the pivotal question of "compelling circumstances" which TECA had directed it to scrutinize critically. The determina-

[5]Judge Johnson, the author of the second TECA opnion, though designated as a member of the panel that heard the first appeal, did not sit for the argument. Only Judges Hastie, the author of the first opinion, and Anderson were present.

ton was direct and to the point:

> ". . . . it effectively eliminates recent comers from the crude oil marketing industry *without any compelling circumstances to do so* . . . ." (App. 18).

The reversing TECA opinion expressly approved those findings and did not question the evidentiary support on which they rest (App. 33):

> "We do *not* overturn the district court's finding that new entrants to the business are foreclosed.
>
> . . .
>
> "Basin may engage in any *other* lawful activity."[6]

The district court also followed the directions in the first TECA opinion to determine as a *fact* whether the minor adjustments to the freeze meaningfully broadened petitioner's access to supply. It went through each change from inception and found:

> "The relationships, pressures, and economic interests in the oil industry are such as to have made the various amendments to the freeze rule *insignificant* in improving the access of new market-entrants to crude oil supplies. Basin has attempted in good faith to purchase crude oil supplies and to compete as a newcomer in the crude oil marketing business under each of such amendments, and all such attempts have been fu-

[6]W. R. Davis, the principal owner and chief executive officer of Basin, was not equipped to go into some other business. In explanation of his formation of Basin he testified (R 25): "Well, the transportation by truck and by pipeline and the crude oil marketing business is really the business that I have known practically all my life, particularly the transportation aspects of it and I wanted to get back in business."

tile because of the obstacles built into the regulation and beyond the reasonable control of Basin."

Then the district court addressed itself to whether the permanent foreclosure of new competition and the threatened destruction of petitioner were *necessary*, as FEA argued, to protect crude oil supplies of independent refiners. It found the freeze to be quite *unnecessary*.

Subsequently the soundness of that determination was reinforced by the publication of a monumental study done for the President of the United States under the co-chairmanship of *Frank G. Zarb*, FEA Administrator, and *Paul W. MacAvoy* of the Council of Economic Advisors. On January 11, 1977, there was publicly released a 428 page report of the *Presidential Task Force on Reform of Federal Energy Administration Regulations* which recommends that the FEA **"eliminate the supplier/purchaser freeze on crude oil"** — both during normal supply periods and during shortage periods (pp. 20-21).

From the evidence the district court found these facts (App. 16):

> "To assure adequate supplies of crude oil to small independent refiners, the FEA presently has in effect a regulatory program (the 'buy-sell' program) which enables it to provide for an equitable allocation of crude oil among all domestic refineries.
>
> "Although it would entail some administrative burden, the FEA can make reasonable modifications in its buy-sell program to avoid any unwarranted deprivations upon small independent refiners which might be caused by the abolition of the freeze rule."

The record fully supported those findings. On appeal TECA in effect acknowledged that (App. 31-2):

> "It is true that the district court found that the buy-sell program could do just as effective a job of protecting the small independent refiners as the current freeze rule, and *we do not specifically overturn that finding*."[7]

TECA's second opinion accurately describes the *standards* of judicial review applied by the district court and the relief granted (App. 23):

> "Because of these factors, the supplier-purchaser freeze rule was found to be **arbitrary, capricious,** and an **abuse of discretion,** and its enforcement against Basin was enjoined."

Those are the standards of judicial review and the specific remedy expressly prescribed by statute (*supra* p. 3).

In reversing, TECA regards those standards prescribed by *statute* as too lax and substitutes instead a different standard of its own making (App. 23):

> "Of critical importance to this case is what

[7]TECA inferred substantial legal significance from the mere identity of the intervenor, saying, "That the trade association [IRAA] of these refiners attempted to intervene in this case to save the regulations supports such a conclusion." This is a bootstrap argument because FEA and the Justice Department had themselves solicited the intervention. On July 16, 1976, the trade association secretary sent out a bulletin to his membership stating "IRAA has been asked by the Federal Energy Administration and the Department of Justice to help in defending . . ." Ex. No. 61.

standard the trial court should have applied in evaluating the FEA's regulation. This Court concludes that the regulation should have been upheld if it had any **rational basis** to support it."

Therein, we submit, lies an error of such far-reaching import as virtually — perhaps literally — to nullify the right of a citizen aggrieved by federal *adminstrative* action to the protection of the meaningful *judicial* review which Congress wrote into the scheme of things.

REASONS FOR GRANTING THE WRIT

There are three.

I

The court below has erroneously decided an important and recurring question of federal law that should be authoritatively settled. It has a potentially controlling effect on every judicial review of any administrative action by the FEA — and perhaps even by other federal administrative agencies as well.

If the second TECA opinion stands, the citizen's right to judicial review of the actions of this very active and far-reaching agency is meaningless and no longer worth the effort. The loss of a right so fundamental to our system of government would be truly tragic:

> "The guarantee of legality by an organ *independent* of the executive is one of the profoundest, most pervasive premises of our system . . . . it is clear that the country looks, and looks with good reason, not to the agency, but to the courts for its ultimate protection against executive abuse."[8]

Only last April TECA assured petitioner that it would be afforded a *meaningful* judicial review of administrative action which was devastating to petitioner and appeared to be fundamentally unreasonable. TECA's original opinion in this case specified the controlling fact issues and directed the district court to make a "critical scrutiny" of the offensive regulation in "an expedited hearing". That direction was scrupulously followed. Comprehensive findings and conclusions were made. The district court heard two full weeks of evidence and, on the basis of detailed findings from that evidence, concluded that the freeze out regulation

> "is **arbitrary, capricious,** and an **abuse of discretion** in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so and in that it does not, as to such new market entrants, constitute an allocation of crude oil but is rather a total denial of access to crude oil to them and is unlawfully discriminatory as to the Plaintiff and any other new market entrant." (App. 18).

TECA's second opinion does not question the record support for that conclusion. Rather, contrary to its earlier opinion in this case, *the Court now says that that is not enough!!* We are now told that the district court could enjoin the enforcement of the regulation against petitioner only if it first concluded that the

[8]Jaffe, *Judicial Control of Administrative Action* (Little Brown and Company 1965), p. 324.

agency was totally *irrational*. Surely there can be administrative error short of insanity. And administrative action that is arbitrary, capricious, and an abuse of discretion *is* "*irrational*" — in every sense of the word except "insane".

If it really is the law that this administrative agency — or any other — can act arbitrarily, capriciously, and with an abuse of discretion and still have its actions immune from judicial correction so long as there is any rational argument for them, then for all practical purposes the administrative agency has become the ultimate judge of its own conduct.

II

The decision below is in conflict with two different acts of Congress. The Administrative Procedure Act says in plain English that the "reviewing court *shall* hold unlawful and set aside agency action found to be **arbitrary, capricious, an abuse of discretion,** or otherwise not in accordance with law". (*supra* p. 3). The Economic Stabilization Act of 1970 likewise prescribes as the proper standard of judicial review of administrative actions the question of whether they are **arbitrary** or **capricious.** (supra p. 3). The opinion below, in holding findings of arbitrariness and capriciousness to be an inadequate basis for judicial action —and insisting upon a determination of "irrationality"—apparently *in haec verba*—takes away from the aggrieved citizen that measure of protection which Congress has afforded him.

The fact that such an error was committed by

TECA should be of unique concern because, unlike other courts of appeal, there is no sister court with jurisdiction to exericse its own judgment on this important question. There can be no conflict between circuits when only one court of appeals has exclusive jurisdiction. Section 211(b) of the Economic Stabilization Act of 1970, 12 USC 1904, note, creates TECA and provides that in general that court

> "shall have *exclusive* jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

That condition in itself merits special alertness in the exercise of the supervisory jurisdiction of this Court, because, in the absence of review by this Court, a TECA error is peculiarly self-perpetuating.

In fairness to the judges who serve on TECA it should be said that the problem is aggravated by the fact that their responsibilities on that court are in addition to the heavy workloads under which they already labored. The Chief Justice of the United States in his 1977 Report to the American Bar Association, 63 A.B.A. Journal 504, 506 (April, 1977), made this point:

> "Again in 1973, the Congress created the Emergency Court of Appeals and, again, no provision was made for judges except that the Chief Justice was directed to designate members of that court from judges then in service. Here, a very important judicial function was added with no provision made for its performance."

Though TECA, being vested with exclusive intermediate appellate responsibilities, cannot be in conflict on this question with other circuits, it does sit in panels of three and is now in conflict with itself.

With a change in panels TECA has done a complete about face in this very litigation. In fact the inconsistency of the conflicting decisions by two panels hearing the same case is so glaring that it has been *publicly* emphasized in the Commerce Clearing House reporter:

> "In its earlier decision to send the case back to the district court, TECA made a statement implying support for the marketer's position: 'Certainly, any governmental action which will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances.' **TECA, however, normally sits as a three-judge panel, and two out of the three judges involved in the first opinion were not on the bench when the reversal was handed down.**"[9]

The present Chief Judge of the Fifth Circuit has spoken eloquently to this very point:

> "[A] most important consideration is stability in the law — a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned. That, of course, is a matter of growing concern to Courts such as this one in which as a multiple Judge tribunal, we sit by statute in panels of not more than three

[9]CCH Energy Management, report of March 15, 1977, p. 2. See also footnote 5 at p. 8 above.

> judges. 28 U.S.C.A. § 46(c). * * * We think that in a multi-Judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally important, the bar who must advise clients or litigants in situations yet to come, will know that in the absence of most compelling circumstances, the decision on identical questions, once made, will not be re-examined and re-decided merely because of a change in the composition of the Court or of the new panel hearing the case."[10]

This Court, which always sits *en banc*, is the proper tribunal to act in that situation. It is analogous to a conflict among circuits which is traditionally recognized as a very good reason for the grant of certiorari.

III

The decision below is a death sentence for petitioner. The district court specifically found from substantial evidence that, if the freeze rule is not corrected, "in all likelihood, Basin will be forced out of business". (App. 16).

The immediate devastation of that "sentence" is perhaps only upon a few owners and twenty or so employees. The broader impact is on the public interest that we Americans believe to be well served by new competition. And there are intangible repercussions upon other citizens who one day themselves may be deprived of the right to continue some small busi-

[10]Lincoln National Life Insurance Co. v. Roosth, 306 F.2d 110, 113-14 (5th Cir. 1962) as quoted in Lumbermen's Mutual Casualty Company v. Wright, 322 F.2d 758, 764 (5th Cir. 1963).

ness because arbitrary and capricious administrative actions are forcing it to close.

For the FEA to take away petitioner's right to do business is no less serious than confiscating its building, trucks, funds and other assets and turning its employees out into the streets for the right to do business is itself the sum total of petitioner's assets of value. Mr. Justice Brandeis put it so simply:

> "The right to carry on business — be it called liberty or property — has value. To interfere with this right without just cause is unlawful."[11]

In a word the action against which petitioner sought and obtained judicial protection from the reviewing district court is nothing less than a confiscation of its liberty and its property — all without compensation of any kind.

CONCLUSION

Candidly there is a growing resignation to the view that TECA is a special tribunal of otherwise busy judges established to *defend* FEA actions — regardless of the merit of the challenge — rather than genuinely to *review* them. Decisions such as the second TECA opinion below tend to perpetuate that unhealthy loss of confidence in the use of the judiciary as a protector against administrative excesses. In the nature of human affairs no administrative agency can be right all of the time. When any branch of government lapses into thinking otherwise, individual

[11] Dorchy v. Kansas, 272 U.S. 306, 311 (1926).

rights begin to lose their meaning and it is not an overstatement that nations begin to decay.

For the foregoing reasons, we believe the grant of this petition for a writ of certiorari to be in the highest traditions of the supervisory appellate jurisdiction of this Court.

Respectfully submitted,

CECIL E. MUNN
1800 First National Bank Building
Fort Worth, Texas 76102

NORTHCUTT ELY
Watergate Six Hundred Building
Washington, D.C. 20037
Counsel for Petitioner

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Appendix to Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

CECIL E. MUNN
1800 First National Bank Building
Fort Worth, Texas 76102

NORTHCUTT ELY
Watergate Six Hundred Building
Washington, D.C. 20037

May 9, 1977

APPENDIX INDEX

BASIN, INC., Plaintiff-Appellant,

v.

FEDERAL ENERGY ADMINISTRATION and Frank Zarb, Individually and as Administrator of the Federal Energy Administration, Defendants-Appellees.

No. 5—14.

Temporary Emergency Court of Appeals.

Decided April 6, 1976.

As Amended April 12, 1976.

[534 F.2d 324]

HASTIE, Judge.

In the district court, Basin, Inc. sued Federal Energy Administration (FEA) to enjoin the enforcement of section 211.63 of the agency's regulations. Adopted in January, 1974, that section was the so-called "December 1 rule" that regulated the allocation of old domestic crude oil by freezing supplier-purchaser relations as they existed December 1, 1973.[1]

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[1] "§ 211.63 Supplier/purchaser relationships.

"(a) All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program, except purchases and sales made to comply with this program: *Provided, however,* That (1) any such supplier/purchaser relationship may be terminated by the mutual consent of both parties; (2) the provisions of this paragraph do not apply to the first sale of crude oil pursuant to § 210.32 of this chapter; and (3) the provisions of this paragraph shall not apply to the seller of any new crude petroleum or released crude petroleum, as defined in Part 212, if the present purchaser of such crude petroleum refuses, after notice by the seller, to meet any bona fide offer made by another purchaser to buy such crude petroleum at a lawful price above the price paid by the present purchaser." 10 C.F.R. (1975) § 211.63(a).

At a hearing on a motion for preliminary injunction, it appeared that Basin is a marketer of crude oil. A major part of a marketer's business is buying crude oil from producers and reselling it to refiners,[2] although most domestic crude oil is sold by the producer directly to a refiner. On December 1, 1973, Basin had been in business only two months. Before the freeze date it had obtained only small deliveries of crude oil under contracts with a few suppliers, and it was negotiating with others for additional quantities of oil.

For a year or more, Basin complained without avail to FEA that section 211.63 operated unjustly in precluding it from establishing adequate sources of supply for its new enterprise. Then, on August 31, 1975, the regulations expired with the emergency legislation under which they had been issued.

Within a few weeks Basin contracted for and began to receive old crude oil from several new suppliers. But on September 29, 1975, the Emergency Petroleum Allocation Act of 1975, P.L. 94—99, became law. That statute reinstated the lapsed regulations, among them section 211.63, retroactive to their August 31 expiration date. For the purposes of this case, the effect of this was to invalidate all sales after September 9, 1975 to Basin from its new suppliers.

This led to the present suit and to the motion for a preliminary injunction that would allow Basin to receive oil under the September, 1975, purchase agreements until final disposition of this suit. On October 6,

[2]In its complaint, Basin alleges that marketers also provide other "valuable crude oil marketing services to crude oil producers. . . ."

1975, the district court granted the requested preliminary injunction, and FEA appealed. Thereafter, on motion by FEA, we stayed the preliminary injunction pending our final disposition of the appeal.

Essential to the preliminary injunction was the district court's conclusion that a substantial doubt existed whether the legislative reinstatement of § 211.63 could lawfully restrict future sales under contracts entered into before September 29. However, in *Condor Operating Co. v. Sawhill*, Em.App.1975, 514 F.2d 351, *cert. denied*, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467, we rejected a contention that section 211.63 as originally promulgated could not validly preclude future sales under pre-existing contracts. By the same token, sales made after the Allocation Act of September 29, 1975, are not beyond the reach of that legislation merely because they occur in performance of agreements entered into before September 29.[3]

But the posture of this controversy has been changed by significant events that have occurred since October, 1975. Effective November 18, 1975, FEA has revised § 211.63, prefacing the amendment with an explanatory statement. 40 F.R. 54422, November 24, 1975. It is explained that the amendment permits "the substitution of new resellers [marketers] of crude oil for present resellers,[4] provided certain conditions designed to protect the ultimate refiner of the crude oil were met". Moreover, in the explanatory statement

[3]We express no opinion about the validity of sales completed between September 1 and September 29.

[4]We are told that about 10 per cent of the domestic crude oil supply is handled by marketers.

it is explicitly recognized that in practical operation, the December 1 rule "has necessarily lessened the opportunity for competition in the marketing of crude oil and has effectively prevented new entrants from having significant access to price-controlled oil". As a corrective of this harsh consequence, the revised section 211.63(a) now permits a reseller to buy from a producer a quantity of crude oil that the producer has been selling to another reseller, but only if the refiner to whom the former marketer was selling the oil shall consent to this marketing change. Finally, in thus requiring the refiner's consent, FEA stated that it had considered and rejected an alternative that would require merely that the new marketer offer the oil to the refiner on terms no less favorable than the refiner's arrangements with the preceding marketer. *Id.*

Basin has strongly represented to us that the relationships, pressures and economic interests in the oil industry are such as to make this formal broadening of its access to producers practically meaningless. **We view this issue as involving relevant questions of fact** concerning Basin's present supply and its allegedly futile efforts to enlarge its supply that can most appropriately be resolved through an evidentiary hearing in the district court.

A more recent change in section 211.63 became effective, subject to review after 90 days, on February 12, 1976, in connection with the imposition of price controls on all, not merely old, domestic crude oil. 41 F.R. 7386, 7387, February 18, 1976. The freeze date for supplier-purchaser relations was changed from December 1, 1973, to January 1, 1976. But any member of the industry was declared eligible to become the purchaser in a first sale of domestic crude from a new oil producing property. Beyond that, as originally proposed by FEA in its notice of intended rule making, the new rule would have created similar open competition for oil produced from an old property in excess of that property's January 1, 1976, production level. However, the rule subsequently adopted did not contain this provision. Rather, it expressly restricted access to this increase to purchasers who were buying the output of the property on January 1, 1976. 41 F.R. 7387. With this rule FEA published an explanatory statement that justified the agency's change of position and rejection of the open competition it had proposed by stating that it had acted because "most firms commenting were of the opinion that . . . [the original proposal] would cause severe administrative difficulties in many cases". *We are reluctant to believe that this means that severe administrative burdens on the the federal regulatory agency are offered as a justification for eliminating competition* for oil in excess of former production. On the other hand, *it is difficult to believe that the administrative burdens a willing seller would bear are a reason for not allowing him to sell.* In any event, FEA has had no opportunity to justify to a court this removal of all increase in production from competition among prospective buyers. This too merits original consideration at a hearing in the district court.

Finally, it appears that, pursuant to the mandate of section 454 of the Energy Policy and Conservation

Act, Pub.L. 94—163, 89 Stat. 871, FEA is even now reevaluating its regulations. And one of the indicated motivating concerns that led Congress to require this reevaluation was the problem of opportunity for "crude oil purchasers and resellers who initiated business after the 1972 base period . . . to compete with others for the purchase of crude oil from producers . . . ." S.Conf.Rep.No.94—516, 94th Cong., 1st Sess., at 202, *U.S.Code Cong. and Adm.News*, 94th Cong., 1st Sess. (1975), p. 2043.

In sum, it appears that both FEA and Congress have recognized the disadvantaged position of newcomers like Basin under the crude oil allocation regulations. Beyond that, FEA has properly indicated that, in determining what corrective measures are warranted, this disadvantage must be weighed against the need to protect refiners from deprivation of their established crude oil supplies. But *it is far from clear that the measures taken by FEA to ameliorate the plight of recent comers to the industry are of substantial practical value* or that no reasonable and more effective measures can be taken without imposing unwarranted deprivations upon some refiners. **Certainly, any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances.**

Because of the changed posture of this controversy, we shall vacate the preliminary injunction and remand the cause to the district court for further consideration consistent with this opinion. If necessary to

put in issue the effect and to challenge the reasonableness of the present provisions of section 211.63, the plaintiff shall be permitted to amend the allegations and prayers of its complaint. We believe *an expedited hearing would be appropriate in order to enable the district court to determine promptly the relevant facts* and whether FEA has unreasonably denied administrative relief that can properly be afforded the plaintiff without unwarranted sacrifice of other legitimate interests and public concerns.

It is so ordered. Our mandate shall issue forthwith.

Basin, Inc. v. Federal Energy Administration, et al., U. S. District Court for the Western District of Texas, San Antonio Division, Dkt. No. SA-75-CA-250, October 22, 1976.

[4 CCH, Energy Management ¶26,063]

SUTTLE, Judge.

This action has been brought by Basin, Inc., (Basin) to seek judicial review of the supplier/purchaser freeze rule, 10 C. F. R. § 211.63, 41 F. R. 24338 at 24340-41 (June 16, 1976). The action came on for trial before the Court October 13-21, 1976. The Court finds generally in favor of the Plaintiff and against the Defendants, and makes the following findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Findings of Fact.

1. The Plaintiff, Basin, is a corporation organized under the laws of the State of Texas with its offices and principal place of business in the City of Midland, Midland County, Texas. It is a relatively recent comer to the crude oil marketing industry, having been organized in October of 1973 to engage in the crude oil marketing industry.

2. Basin and its principal stockholder on its behalf made substantial investments and incurred substantial expense in contemplation of conducting a crude oil marketing business.

3. **By December 1, 1973, Basin had commitments from producers to sell to Basin approximately 1,000,000 barrels of crude oil per month,** but deliveries had begun by that date from only approximately 25% of those commitments.

4. The Defendant Federal Energy Administration (FEA) is an agency of the United States. The Defendant Frank Zarb is an employee of the United States acting at all times in his official capacity as Administrator of the Federal Energy Administration.

5. On November 27, 1973, the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. §751 *et seq.*, became law. Section 753(a) directed the President to "promulgate a regulation providing for the mandatory allocation of crude oil . . . ." All regulatory action which is the subject matter of this suit was taken pursuant to that directive by the FEA or its predecessor, the Federal Energy Office (FEO).

6. On December 11, 1973, the FEO issued a proposed regulation providing for the mandatory allocation of crude oil and invited public comments on that proposal. 38 F. R. 34414 (Dec. 13, 1973).

7. The FEO's published proposal would have permitted crude oil producers, upon notice to the existing purchaser at least 30 days prior to the commencement of an allocation quarter, to sell their crude oil to purchasers of their own choice, including Basin or any other new market-entrant. 10 C. F. R. § 200.29(b) 38 F. R. 34421.

8. In response to the invitation mentioned in paragraph 6 above, the FEO received and considered numerous comments on the proposed regulation.

9. After taking such comments into account, on December 27, 1973, the FEO issued the initial regulations providing for mandatory allocation of crude oil. 39 F. R. 744 (Jan. 2, 1974). As issued, those regulations permitted crude oil producers, upon notice to the existing purchaser at least 30 days prior to the commencement of an allocation quarter, to sell their crude oil to purchasers of their own choice, including Basin or any other new market-entrant. 10 C. F. R. §200.29-(i), 39 F. R. 752.

10. Thereafter, on January 14, 1974, without any published notice of intention to do so, the FEO issued a new regulation (also referred to as the "freeze rule") which, with limited exception froze domestic crude oil supplier/purchaser relationships as of December 1, 1973, for the duration of the mandatory crude oil allocation program. 10 C. F. R. §211.64, 39 F. R. 1924 at 1939 (Jan. 15, 1974).

11. As applied to Basin, the freeze rule issued on January 14, 1974, immediately deprived it of approximately 75% of the crude oil purchases previously committed to it and, with insignificant exceptions, denied it access to all other sources of domestic crude oil.

12. Under the freeze rule issued on January 14, 1974, the historical crude oil marketer was accorded the exclusive right to purchase the cheaper price-controlled oil (unless it declined to meet a higher lawful offer made to its supplier by another marketer), and a newcomer was in effect relegated to limited sources of higher-priced oil not subjected to price control.

13. The regulation issued January 14, 1974, had the effect of freezing newcomers to the crude oil marketing business out of access to sources of supply. The FEO realized this but was willing to adopt a regulation with such an effect because it assumed it was dealing with a very temporary regulatory program that would not last more than six months. Such assumption has proved to be false.

14. On April 22, 1975, the FEA issued proposed amendments to the freeze rule for the purpose of allowing new entry into the crude oil marketing business and promoting greater competition in it. 40 F. R. 18182 (April 25, 1975).

15. On October 6, 1975, after hearing and based upon evidence of record before it, that Court entered its PreliminaryInjunction in favor of the Plaintiff and against the Defendants in this cause. Thereafter, Defendants appealed this Court's order to the Temporary Emergency Court of Appeals of the United States (TECA).

16. On October 16, 1975, approximately six months after its amendment proposal of April 22, 1975, and while the appeal before TECA was still pending, the FEA issued a public notice stating.

> "An additional amendment proposed in the April 22, 1975 notice would have effectively allowed the substitution of new reseller of crude oil for the present reseller under certain conditions without the latter's consent. FEA has not yet made a final determination as to whether or in what form this proposed amendment should be issued, and

accordingly is delaying final action on this proposed amendment until its analysis of the issue has been completed." 40 F. R. 49297 (Oct. 22, 1975)

17. On November 18, 1975, the FEA issued an amendment to the freeze rule. 40 F. R. 54422 (Nov. 24, 1975). The amended rule denied a new entrant to the domestic crude oil marketing business all access to supplies of domestic crude oil with the following limited exceptions:

(a) Stripper well oil;

(b) Oil from new producing wells which had not been previously sold to any other purchaser;

(c) New and released oil from a previously productive property if the historical marketer declined to meet a higher lawful offer made to the seller by the new entrant;

(d) Any oil if the refinery customers of the historical marketer consented to the substitution of the new entrant.

18. Under the November 18, 1975, amendment to the freeze rule, a new entrant to the crude oil marketing business had access to the cheaper price-controlled oil only if its competitors or its competitors' customers did not veto its attempts. A newcomer could purchase new or released oil from existing fields only if its competitor—the existing purchaser—declined to meet its higher bid. And a newcomer could purchase old oil only if the refinery customers of its competitors consented to its substitution.

19. On February 12, 1976, in response to the Energy Policy and Conservation Act (Pub. L. 94-163), the FEA issued further amendments to the freeze rule. 41 F. R. 7386 (Feb. 18, 1976). These amendments changed the freeze date from December 1, 1973, to January 1, 1976. In addition, these amendments further restricted the sources of domestic crude oil to which a new entrant to the crude oil marketing business could have access.

20. The amended freeze rule of February 12, 1976, denied a new entrant to the domestic crude oil marketing business all access to supplies of domestic crude oil with the following limited exceptions:

(a) Oil from new producing wells which had not been previously sold to any other purchaser;

(b) Stripper well oil and new oil from a previously productive property if the historical marketer declined to meet a higher lawful offer made to the seller by the new entrant;

(c) Any oil if the refinery customers of the historical marketer consented to the substitution of the new entrant.

21. In issuing its February 12, 1976, amendments to the freeze rule, the FEA issued a public notice stating:

"FEA recognizes the problems that may be created by this rule and therefore is making it effective only for a period of 90 days (i.e., through May 11, 1976)." 41 F. R. 7386 (Feb. 18, 1976).

22. On April 6, 1976, TECA issued its opinion in

the appeal from this Court's Preliminary Injunction of October 6, 1975, and that opinion is reported at 534 F. 2d 324.

23. On April 16, 1976, the FEA issued proposed amendments to the freeze rule and gave notice of a public hearing to be held May 6-7, 1976.

24. On May 12, 1976, the FEA extended the freeze rule, as previously amended on February 12, 1976, for another thirty days—i.e., until June 10, 1976. 41 F. R. 20158 (May 17, 1976).

25. On June 11, 1976, the FEA issued its latest amendment to the freeze rule. 41 F. R. 24338 (June 16, 1976). The terms of that amendment were substantially different from the proposal previously issued by the FEA on April 16, 1976.

26. Under the present provisions of the freeze rule, as last amended on June 11, 1976, new entrants to the domestic crude oil marketing industry are denied all access to supply of domestic crude oil with the following limited exceptions:

(a) Stripper well oil, provided it is purchased for resale to a "small refiner";

(b) Oil from new producing wells which has not been previously sold to any other purchaser;

(c) Any oil previously sold by a producer below the ceiling price, if the historical marketer declines to meet a higher lawful offer made to the producer by the new entrant;

(d) Any oil if (i) the refinery customers of the historical marketer consent to the substitution of the new entrant, or (ii) in the absence of a particular refiner's consent, if the new entrant offers to supply the same volume of oil to the refiner at a price which includes transportation and handling charges less than or equal to those of the historical marketer.

27. **The freeze rule, as last amended by the FEA on June 11, 1976, and as in effect at all times since January 14, 1974, has effectively eliminated relatively recent comers—including Basin—from the crude oil marketing business.**

28. Basin has had a marginal economic existence from and after January 14, 1974.

29. This marginal existence is the direct result of the impact of the freeze rule and not the result of Basin's failure to charge its customers the maximum price to which it may have been entitled under the applicable price-control regulations.

30. **The relationships, pressures, and economic interests in the oil industry are such as to have made the various amendments to the freeze rule insignificant in improving the access of new market-entrants to crude oil supplies.** Basin has attempted in good faith to purchase crude oil supplies and to compete as a newcomer to the crude oil marketing business under each of such amendments, and all such attempts have been futile because of the obstacles built into the regulation and beyond the reasonable control of Basin.

31. Neither the November 18, 1975, amendment to the freeze rule permitting a new entrant to buy from a

producer a quantity of crude oil that the producer has been selling to another marketer if the existing refiner consents to the substitution; nor the February 12, 1976, amendment to the freeze rule allowing a new entrant to become a purchaser in a first sale of crude oil from a new oil producing property; nor the June 11, 1976, amendment to the freeze rule, allowing a new entrant to buy from a producer a quantity of crude oil that the producer has been selling to another marketer if the new entrant will supply the same volume of oil to the existing refiner at a price which meets or beats the actual transportation and handling charges of the existing marketer—**none of these amendments to the freeze rule have meaningfully broadened Basin's access to crude oil supplies.**

32. **If the freeze rule as presently constituted remains in effect, in all likelihood, Basin will be forced out of business, and the entry of any newcomer into the crude oil marketing business will be effectively foreclosed.**

33. To assure adequate supplies of crude oil to small independent refiners, the FEA presently has in effect a regulatory program (the "buy-sell" program) which enables it to provide for an equitable allocation of crude oil among all domestic refineries.

34. Although it would entail some administrative burden, the FEA can make reasonable modifications in its buy-sell program to avoid any unwarranted deprivations upon small independent refiners which might be caused by the abolition of the freeze rule.

35. The FEA can correct any problem of "layering" which might result from abolition of the freeze rule by promulgating regulations which attack the problem directly.

Conclusions of Law

1. This Court has jurisdiction of the subject matter of this action. 15 U. S. C. § 754(a)(1)(A); section 211(a) of the Economic Stabilization Act of 1970, set out as a note under 12 U. S. C. § 1904.

2. 10 C. F. R. § 211.63, as amended on June 11, 1976, was issued by the FEA under the authority of 15 U. S. C § 735(a). **By congressional mandate, 10 C. F. R. § 211.63 must: (a) foster competition in all segments of the industry, (b) provide for the equitable distribution of crude oil and of petroleum products within each segment of the industry,** and (c) minimize inflexibility and interference with market mechanisms. 15 U. S. C. § 753(b)(1).

3. Because 10 C. F. R. § 211.63 fails to: (a) foster competition in all segments of the industry, (b) provide for the equitable distribution of crude oil and of petroleum products within each segment of the industry, and (c) minimize inflexibility and interference with market mechanisms, it contravenes the underlying policies of the Emergency Petroleum Allocation Act.

4. **There are no compelling circumstances justifying the effect of 10 C. F. R. § 211.63 in effectively eliminating relatively recent comers—including Basin—from the crude oil marketing business.** Neither the problem of "layering" nor the problem of assuring

small independent refiners adequate supplies of crude oil constitute compelling circumstances justifying the existence of 10 C. F. R. § 211.63.

5. 10 C. F. R. § 211.63 is **arbitrary, capricious, and an abuse of discretion in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so and in that it does not, as to such new market entrants, constitute an allocation of crude oil but is rather a total denial of access to crude oil to them and is unlawfully discriminatory as to the Plaintiff and any other new market entrant.**

It is therefore Ordered, Adjudged, and Decreed that Plaintiff have and it is hereby granted the following relief:

1. It is judicially declared that 10 C. F. R. § 211.63 as it now exists:

(a) effectively eliminates recent comers from the domestic crude oil marketing business and that there are **no compelling circumstances** to justify that elimination, and

(b) contravenes the Congressional mandate set forth in 15 U. S. C. § 753(b)(1), and

(c) does not constitute an allocation of crude oil as to new entrants to the crude oil marketing business, but rather is a total denial of access to crude oil to them, and

(d) is **arbitrary, capricious, and an abuse of discretion, and**

(e) is therefore invalid, unlawful, null and void.

2. The Defendants should be, and they hereby are, **permanently enjoined from enforcing or executing 10 C. F. R. § 211.63 against the Plaintiff.**

3. Nothing herein contained shall prohibit the FEA:

(a) From further amending its regulations so as to require any producer of crude oil, to the extent necessary, to sell any particular crude oil on reasonable terms and conditions to any particular refinery, where such an amendment is necessary to provide an equitable supply of crude oil for that refinery.

(b) From further amending its regulations to prohibit any change of historical purchasers under circumstances which the FEA finds would insert a purchaser in addition to the number then existing between the original producer and the ultimate refiner in such a way as to increase the price at which such crude oil can be lawfully sold to the ultimate refiner, or to take such other action, nondiscriminatory as among resellers, to prevent price increases by means of chain resales commonly referred to as "layering."

(c) From further amending its regulations so as to minimize the administrative inconvenience, if any, resulting from this order or otherwise carry out the statutory responsibilities of the FEA; provided that no such amendment shall be made which would effectively eliminate newcomers from entering into the crude oil marketing business.

IT IS ACCORDINGLY, SO ORDERED this 22nd day of October, 1976.

This action came on for trial before the Court, Honorable D. W. Suttle, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED and ADJUDGED

that 10 C. F. R. § 211.63 as it now exists: (a) effectively eliminates recent comers from the domestic crude oil marketing business and there are no compelling circumstances to justify that elimination, and (b) contravenes the Congressional mandate set forth in 15 U. S. C. § 753(b)(1), and (c) as to new entrants to the crude oil marketing business, does not constitute an allocation of crude oil but rather is a total denial of access to crude oil to them, and (d) is arbitrary, capricious, and an abuse of discretion, and (e) is therefore invalid, unlawful, null and void.

IT IS FURTHER ORDERED and ADJUDGED

that the Defendants should be, and they hereby are, permanently enjoined from enforcing or executing 10 C. F. R. § 211.63 against the Plaintiff.

Dated at San Antonio, Texas, this 22nd day of October, 1976.

Basin, Inc. v. Federal Energy Administration, et al., U. S. Temporary Emergency Court of Appeals, Dkt. No. 5-21, March 7, 1977.

JOHNSON, Judge.

This case involves the validity of 10 C. F. R. §211.63, a regulation of the Federal Energy Administration (FEA hereinafter) commonly known as the "supplier-purchaser freeze" rule. In 1973, Congress passed the Emergency Petroleum Allocation Act[1] in response to problems that it perceived in the petroleum industry. A notable cause of these difficulties was the Arab oil embargo. The Act required FEA to allocate the distribution of domestically produced crude oil in pursuance of certain stated objectives, and Section 211.63 was promulgated by FEA for this purpose.

Section 211.63 has the effect, with the exceptions discussed later, of locking or freezing into place the supplier-purchaser relationships that existed before the freeze date of December 1, 1973. If a producer of crude oil had been supplying a certain reseller, or if the reseller had been supplying a certain refiner, then the "freeze" rule required that they continue to do so. A related, though smaller, program is the refiner regulatory ("buy-sell") program. It is designed to protect small independent refiners from large integrated ones which own their sources of supply. Under it, the independent refiners may compel the integrated companies

[1]15 U. S. C. § 751 *et seq.*, as amended.

to sell them petroleum, the exact quantity being determined by regulations.[2]

Plaintiff-appellee Basin, Inc., is a reseller of petroleum. It buys from domestic producers of oil and resells the same oil to refiners. The company was founded only two months before the Allocation Act became law. It had made arrangements for the purchase of a substantial quantity of petroleum, but **it was deprived of about seventy-five percent of that supply by the supplier-purchaser freeze.** Since that time, an apparently growing and profitable business has undergone economic stagnation.

Basin sought administrative relief for its problems, particularly a change in the FEA regulations. Some modifications were made, but Basin considered them to be unsatisfactory. It therefore instituted a suit in the Western District of Texas. The district court entered a preliminary injunction against FEA, based on doubt that the Allocation Act could abrogate contracts entered into before the freeze date. However, this Court found that particular issue already to have been settled in the agency's favor. It remanded for consideration of the extent to which Basin was foreclosed from the market by the contested regulation, and FEA's justification for any such result. *Basin, Inc. v. Federal Energy Administration*, 534 F. 2d 324 (Em. App. 1976).

Before trial, the Independent Refiners Association of America (IRAA) moved to intervene. The district court denied the motion and refused to permit IRAA's

[2]See 10 C. F. R. § 211.65.

counsel to participate in the trial. Cases 5-20 and 5-22 involve appeals by IRAA from this denial of intervention. Because of this Court's disposition of the principal case, 5-21, it is unnecessary to reach the intervention issue.[3]

At the conclusion of the trial in which Basin and FEA participated, **the district court found that a continuation of the freeze rule would drive Basin out of business and effectively foreclose any new entrants into the crude oil marketing field.** It found the exceptions to the freeze rule to be "insignificant" and said that any hardship caused by the abolition of the rule could be compensated for under the buy-sell program. It further concluded that the regulation failed to advance three of the underlying policies stated in the Allocation Act, and thus that it contravened the statutory mandate. Because of these factors, **the supplier-purchaser freeze rule was found to be arbitrary, capricious, and an abuse of discretion,** and its enforcement against Basin was enjoined. From this judgment, FEA appeals.

Of critical importance to this case is what standard the trial court should have applied in evaluating the FEA's regulation. **This Court concludes that the regulation should have been upheld if it had any rational basis to support it.** It is true that reviewing courts should not simply "rubber-stamp" the actions of administrative agencies. *NLRB v. Brown*, 380 U. S. 278,

[3]Mr. Dryer, IRAA's counsel, represented to the Court in oral argument that IRAA would be satisfied with a reversal of the district court in 5-21, without consideration of the intervention issue. As this Court does reverse the district court in the main case, the intervention issue is moot and therefore it is not necessary to consider 5-20 and 5-22.

291-292 (1965); see *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U. S. 726 (1973); *Volkswagenwerk v. Federal Maritime Commission*, 390 U. S. 261 (1968). However, the decisions of administrative agencies are not lightly disregarded. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94 (1973). To sustain an agency's statutory interpretation, it is not necessary to "find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall v. Tallman*, 380 U. S. 1, 16 (1965). The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U. S. 143, 154 (1946); *NLRB v. Hearst Publications*, 322 U. S. 111, 131 (1944). The attitude of this Court toward judicial review of economic controls has been along these lines. "It is a well settled principle that the courts place great weight on the interpretations given to statutes and regulations by those agencies charged with the responsibility of administering them." *Pacific Coast Meat Jobbers Ass'n, Inc. v. Cost of Living Council*, 481 F. 2d 1388, 1392 (Em. App. 1973). *See University of Southern California v. Cost of Living Council*, 472 F. 2d 1065, 1068-1069, (Em. App. 1972), *cert. den.* 410 U. S. 928.

Perhaps the decision most relevant to this case is

Condor Operating Co. v. Sawhill, 514 F. 2d 351 (Em. App. 1975), *cert. den.* 421 U. S. 976. There, Section 211.63 was challenged by an oil producer. This Court stated, "Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate." *Id.* at 359. See *Pasco, Inc. v. Federal Energy Administration*, 525 F. 2d 1391 (Em. App. 1975); *Pacific Coast Meat Jobbers Ass'n, Inc. v. Cost of Living Council, supra; Reeves v. Simon*, 507 F. 2d 455 (Em. App. 1974), *cert. den.*, 420 U. S. 991; *Mandel v. Simon*, 493 F. 2d 1239 (Em. App. 1974); *University of Southern California v. Cost of Living Council, supra.* This standard is the proper one in the present case.[4]

The problem remains whether the questioned regulation meets this rationality standard. The Emergency Petroleum Allocation Act specifies nine objectives

[4]There appears to have been some confusion on the part of appellee with regard to a statement in the opinion of this Court when this case was here before. That opinion stated, "any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be juestfied only by a clear showing of compelling circumstances." *Basin, Inc. v. Federal Energy Administration*, 534 F. 2d 324, (Em. App. 1976). However, this dictum was made without the benefit of a full justification by FEA of its actions, and certainly cannot be interpreted as calling for a change in the standard of review of administrative action. In fact, the prior opinion emphasized that the case was being remanded for consideration of the *reasonableness* of FEA's action. *Id.* at 327.

which the FEA is to pursue in its regulations.[8] However, the objectives are broad and the FEA must be afforded substantial leeway in attempting to attain them. Each stated goal cannot be raised to the status of a mandatory requirement for each regulation, as the legislative history clearly shows. The House committee report states that the drafters were "careful

[8](b) (1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health (including the protection of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large):

(C) maintanance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbrand independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

to provide the President with adequate flexibility so that he is not straight jacketed into accomplishing these objectives in instances where it would be inimicable to the public interest." H. R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973), 1973 *U. S. Code Cong. & Ad. News*, 2590. The Conference Report says that it may be impossible to satisfy one objective without sacrificing the accomplishment of another. Conference Report 93-628, 93d Con. 1st Sess. (1973) 1973 *U. S. Code Cong. & Ad. News*, 2688. Further, the statute itself says that the stated objectives are to be pursued "to the maximum extent *practicable*." (Emphasis added). This indicates that a considerable degree of flexibility was intended by Congress and was incorporated into the Act. *Pasco, Inc. v. Federal Energy Administration*, 525 F. 2d 1391 (Em. App. 975).

In *Condor Operating Co. v. Sawhill*, *supra*, this Court held Section 211.63 to be a "rational exercise" of the power conferred by Congress. The regulation has been amended since that time, but Basin cannot demonstrate how the amendments make it less rational. Rather, it tries to distinguish *Condor* from this case principally on the basis of the district court's finding that new entrants, such as Basin, are barred by the regulation from the crude oil marketing business. This factor, it contends, renders an otherwise rational regulation irrational.

Assuming that new entrants are barred the regulation may still be viewed as a rational attempt to implement the congressional mandate. The primary aim of the Emergency Petroleum Allocation Act is to deal with "existing or imminent shortages and dislo-

cations in the national distribution system." Conference Report 93-628, 93d Cong. 1st Sess. (1973) 1973 *U. S. Code Cong. & Ad. News*, 2688. And Congress was particularly concerned with protecting small, independent refiners and marketers from large integrated companies. It is uncontested that the supplier-purchaser rule stabilizes the distribution system and greatly helps to protect the sources of supply of the small, independent refiners. That the trade association[6] of these refiners attempted to intervene in this case to save the regulation supports such a conclusion. Under these circumstances, it is rational for FEA to conclude that a measure which accomplishes one of the major goals of the Act is of such overriding importance that it is consistent with the statutory mandate, even if it does have the undesirable side effect of foreclosing the entry of new resellers into the industry.

The district court found that Section 211.63 failed to effectuate three of the stated purposes of the Allocation Act. It is said that the freeze rule failed to (a) foster competition in all segments of the industry, (b) provide for an equitable distribution of oil, and (c) minimize inflexibility and interference with market mechanisms. As indicated above, the FEA must be given considerable leeway in pursuing these objectives, and it can rationally argue that it is in fact effectuating those singled out by the district court as well as possible. The freeze rule is failing to foster competition in that it makes it more difficult for new

[6]Independent Refiners Association of America, appellant in 5-20 and 5-22.

entrants to come into the reselling business, but the freeze is encouraging competition greatly in that it protects the small independent refiners from the large integrated companies. Without this rule, or something like it, there is considerable reason to believe that the integrated companies would severely restrict the ability of the independent refiners to compete. Conference Report, 93-628, *supra*. Thus it is rational for FEA to conclude that the freeze rule, on balance, promotes competition. Whether the rule causes an equitable distribution of petroleum depends in great part on how the term "equitable" is defined. The legislative history indicates that Congress intended for refiners to receive amounts equal to what they had historically received, if "practicable." Conference Report, 93-628, *supra*. This suggests that Congress considered it "equitable" for the refiners to have their sources of supply protected, which is what the freeze rule does. The rule therefore contributes to an "equitable" distribution of petroleum to a considerable extent, even if the share that Basin gets is not considered to be "equitable." It should be added that, when dealing with terms as broad and subject to conflicting interpretations as "equitable" is, deference to the agency charged by Congress with making that interpretation is especially appropriate. The district court found that the regulation did not minimize inflexibility and interference with the market mechanisms as the statute calls for. This essentially is true, because a mandatory allocation is by its nature an interference with the market mechanism. But Congress required a mandatory allocation. Further,

the only alternative to the freeze rule suggested by either Basin or the district court was an extension of the buy-sell program. Adopting the buy-sell program would also involve the government in directing where oil should go, and thus could hardly be considered an improvement over the freeze rule in that regard. At least the freeze rule adopts the patterns that the free market has followed in the past, even if it does not permit the market to operate unhindered today. It is therefore clear that even in the three specific instances where the district court found that the freeze rule was not effectuating the statutory mandate, FEA has rational reasons for believing that it is in fact doing so. And as long as those reasons are rational, the regulation must be upheld.

Basin claims that the small, independent refiners can be protected just as well by an extension of the buy-sell program as by a continuation of the freeze rule. The district court so found. However, it is quite reasonable for FEA to conclude otherwise. Expanding the buy-sell program, as suggested, would tremendously increase the number of transactions which FEA would have to conduct. Whenever an independent refiner needed crude oil, FEA would have to determine who was the nearest supplier with the right type and quantity of crude oil, and compel him to sell the needy refiner. Thus, a government agency would have to make innumerable decisions as to the distribution of petroleum which in the past were made by the market mechanism. It is quite arguable that an agency could not do nearly as effective a job as the freeze rule does. Michael Paige, assistant general counsel for allocation

for FEA, testified that it is "very difficult for a Federal agency to make judgments as to how to get crude oil to a needy smaller independent refiner." He said that there were problems under the buy-sell program at its present size, and that administration of a much expanded program would be "incredibly difficult." In fact, he found it "unbelievable" that any allocation plan other than the freeze could adequately do the job. Rather than trying to develop a complex new distribution pattern by agency fiat, FEA has frozen into place one that worked. Paige testified that "allocation as of a freeze date is a lot more effective provision than any administrative assignment procedure that we could ever manage." It is certainly reasonable to conclude that freezing into place a properly functioning system is more efficient than having a government agency design a vast new one. And deference to an agency's judgment is especially appropriate when the issue is the ability of that same agency to perform certain tasks. Difficulties in administering the expanded buy-sell program involve more than simply irritating bureaucrats. To the extent the FEA fails to efficiently allocate petroleum, the shortages and dislocations which the Allocation Act was intended to prevent will be increased. In sum, FEA has rational reasons for concluding that no allocation program can protect the small independent refiners to the same degree as the supplier-purchaser freeze rule, and that it is therefore the approach which best achieves the congressional purpose.

It is true that the district court found that the buy-sell program could do just as effective a job of pro-

tecting the small independent refiners as the current freeze rule, **and we do not specifically overturn that finding.**[7] However, the issue is not what a court believes would be the most effective course. The issue is whether the course that FEA has adopted is "for rational reasons . . . deemed most appropriate." *Condor Operating Co. v. Sawhill, supra,* at 359. The district court does not appear to have measured Section 211.63 by this rationality standard. In any case, a correct application of that standard requires that the regulation be upheld.

Also supporting the reasonableness of the freeze rule are the seemingly substantial exceptions to it. All oil produced by stripper oil wells, twelve to fifteen percent of domestic production, is subject to no restraints, provided it is purchased for resale to a small refiner. All oil from new oil wells—wells which have not produced before—are free from restraint. If a new reseller fails to meet the offer, then the producer may switch customers. Of course, no offer may exceed the legal price ceiling. Another exception is that a substitution of one reseller for another is permitted if the refiner who has been receiving the oil agrees to the substitution. And finally, one reseller may replace another if he agrees to supply the same refiner with the oil and charge no more for transportation and handling. In sum, if a seller can pay the producer more or charge the refiner less, or if the refiner has no objection to the supplier's being changed, then

[7]The Court is constrained to note, however, that Michael Paige, an official experienced in administering the allocation program, testified to the contrary, and Basin has directed the Court to no evidence which contradicts his testimony.

Basin and other new resellers may replace old resellers. They may also obtain new oil and oil from stripper wells. This would seem to open up a lot of potential areas for new resellers. **We do not overturn the district court's finding that new entrants to the business are foreclosed.** But the exceptions to the freeze rule demonstrate an attempt by FEA to aid the new resellers, without harming the refiners. This further supports the reasonableness of FEA's approach.

Finally, Basin argues that Section 211.63 constitutes a taking of property for public purposes without just compensation, in violation of the Fifth Amendment. The district court made no such findings. In fact, the only effect that the regulation had on Basin was the incidental one of preventing it from making a profit in a very narrow area of the petroleum industry—the purchasing of domestic petroleum from independent producers and the reselling of it to independent refiners. **Basin may engage in any other lawful activity.** The government is not required to create or preserve business conditions which are favorable to a corporation in order to avoid taking property for public use. This Court has stated that "the Fifth Amendment prohibitions against the taking of property for public use without just compensation or due process of law refers only to direct appropriation and not to consequential injuries resulting from the exercise of lawful regulations." *Condor Operating Co. v. Sawhill, supra,* at 361. Basin's contention is without merit.

In upholding Section 211.63, this Court expresses no opinion as to the wisdom or efficacy of the questioned regulation. The judiciary does not comprise a higher administrative board charged with determining what agency action would be in the best interest of the nation. In cases such as this one, once it is determined that a contested regulation is a rational attempt to effectuate the congressional policy, the inquiry must be closed.

Accordingly, the judgment of the district court is REVERSED.

No. 76-1555

In the Supreme Court of the United States

OCTOBER TERM, 1977

BASIN, INC., PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

LEONARD SCHAITMAN,
STANLEY D. ROSE,
BRUCE G. FORREST,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 21-34) is reported at 552 F. 2d 931. The opinion and order of the United States District Court for the Western District of Texas (Pet. App. 8-20) are not officially reported. An earlier opinion of the Temporary Emergency Court of Appeals (Pet. App. 1-7) is reported at 534 F. 2d 324.[1]

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on March 7, 1977; petitioner's request for rehearing, with a suggestion for rehearing *en banc*, was denied on April 18, 1977. The petition for a writ of certiorari was filed on May 9, 1977. The jurisdiction of this Court is invoked under 15 U.S.C. (Supp. V) 754(a)(1).

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[1]Petitioner, in its appendix, has altered the opinions below by italicizing and setting into bold print portions that were not so emphasized in the original texts.

QUESTION PRESENTED

Whether 10 C.F.R. 211.63 of the regulations of the Federal Energy Administration, "Domestic Crude Oil Supplier/Purchaser Relationships," is arbitrary, capricious, or an abuse of discretion.

STATUTE AND REGULATION INVOLVED

Sections 2, 4(a), and 4(b)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 629, as amended, 15 U.S.C. (Supp. V) 751, 753(a), and 753(b)(1), and 10 C.F.R. 211.63 are set forth in the Appendix, *infra*, pp. 1a-9a.[2]

STATEMENT

1. Congress enacted the Emergency Petroleum Allocation Act of 1973 in response to shortages of crude oil and other petroleum products that threatened severe economic dislocations and that would "jeopardize the normal flow of commerce and constitute a national energy crisis * * *." Section 2(a) of the Act, 15 U.S.C. (Supp. V) 751(a). As stated in Section 2(b), 15 U.S.C. (Supp. V) 751(b), the purpose of the Act was "to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." Section 4(a) of the Act, 15 U.S.C. (Supp. V) 753(a), specifically directs the President to "promulgate a regulation providing for the mandatory allocation of" petroleum products, and Section 4(b)(1)(D) sets forth nine goals that, "to the maximum extent practicable," the regulation is to meet, including the preservation of "the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers." 15 U.S.C. (Supp. V) 753(b)(1)(D).

[2]The 1973 Act was superseded in part by the Emergency Petroleum Allocation Act of 1975, Pub. L. 94-99, 89 Stat. 481, the relevant provisions of which are not materially different for the purposes of this case.

In response to the statutory directive, the President, through the Federal Energy Administration and its predecessor, the Federal Energy Office, promulgated a regulation, known as the "purchaser/supplier freeze rule," designed to prevent dislocations in the national distribution system and to maintain the competitive viability of small refiners and marketers. 10 C.F.R. 211.63 (App., *infra*, pp. 3a-9a). As originally promulgated, the regulation provided generally that (10 C.F.R. 211.63(b) (1974)):

> All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program * * *.[3]

The rule permits present purchasers to elect to terminate the supplier-purchaser relationship and provides a number of other conditions under which such relationships may be terminated, such as the refusal of a present purchaser "to meet any bona fide written offer made by another purchaser * * * at a lawful price above the price paid by the present purchaser." 10 C.F.R. 211.63(d)(i) and (d) (iii). The regulation also permits, under certain conditions, the substitution of new marketers ("resellers") of petroleum products for existing marketers. 10 C.F.R. 211.63(d)(iv).

2. Petitioner began its business of marketing crude oil in October 1973 (Pet. App. 8). By January 1974, petitioner had secured commitments from suppliers for approximately one

[3]As originally promulgated, the regulation froze supplier-purchaser relationships in effect on December 1, 1973. The regulation currently in effect, promulgated under the authority of the Emergency Petroleum Allocation Act of 1975, Pub. L. 94-99, 89 Stat. 481, freezes those relationships in effect on January 1, 1976 (App., *infra*, p. 4a). Although petitioner's challenge is necessarily to the validity of the regulation currently in effect, the change in dates is not material to the issue in this case. See Pet. 4, n. 2.

million barrels of oil per month (Pet. App. 8-10). The promulgation of the supplier-purchaser rule on January 14, 1974 (39 Fed. Reg. 1924) had the effect of depriving petitioner of approximately 75% of the supply of oil for which it had received commitments.[4]

Petitioner brought this suit to enjoin the application of the rule to it on the ground, *inter alia,* that the regulation was arbitrary, capricious, and an abuse of discretion. The district court granted petitioner's motion for a preliminary injunction. The court of appeals vacated the preliminary injunction, noted certain intervening revisions and proposed revisions of the regulations (Pet. App. 1-7), and remanded the case for an expedited hearing on the merits. The district court then conducted a trial and, at its conclusion, permanently enjoined the Federal Energy Administration from enforcing the regulation against petitioner, on the ground, *inter alia,* that the regulation effectively eliminated recent entrants into the crude oil marketing buisness and that "there are no compelling circumstances to justify that elimination * * *" (Pet. App. 18).

The Temporary Emergency Court of Appeals reversed (Pet. App. 21-34). The court, following its decision in *Condor Operating Company* v. *Sawhill,* 514 F. 2d 351,

[4]The district court found that petitioner had commitments for a million barrels of oil on December 1, 1973, but that "deliveries had begun by that date from only approximately 25% of those commitments" (Pet. App. 8-9). The relationship between supplier and purchaser to which the regulation refers is created not by contractual rights to future supplies but by the actual flow of oil from a supplier to a purchaser on a particular date. See 41 Fed. Reg. 7386; *Condor Operating Company* v. *Sawhill,* 514 F. 2d 351 (T.E.C.A.), certiorari denied *sub nom. Condor Operating Co., et al.* v. *Zarb, et al.,* 421 U.S. 976. Accordingly, as the district court found, the regulation's freezing of relationships existing on December 1, 1973, served to preclude petitioner from receiving 75% of the oil for which it had commitments at that time (Pet. App. 10).

certiorari denied *sub nom. Condor Operating Co., et al.* v. *Zarb, et al.*, 421 U.S. 976, held that the regulation was a rational and permissible exercise of the Administrator's delegated authority. The court held that the rule reasonably effectuates the statutory purpose to protect small and independent refiners from having their supplies terminated by major, integrated companies that might otherwise divert their supplies to their own operations in times of shortage. The court also found that the rule fosters competition, provides for equitable distribution of petroleum products, and minimizes inflexibility and interference with market mechanisms (Pet. App. 28-30).

ARGUMENT

The court below correctly upheld the supplier-purchaser rule and further review is not warranted. There is no conflict among the circuits or within the Temporary Emergency Court of Appeals on this issue; indeed the court expressly followed its earlier decision in *Condor Operating Company* v. *Sawhill, supra,* upholding the regulation. Apart from objecting to the impact of the regulation on its operations, petitioner advances no reasons to support its contention that the regulation is unlawful, or to refute the court's conclusion that the regulation reasonably and effectively serves the various purposes of the Act.

1. Petitioner contends primarily (Pet. 12-17) that the court below employed an erroneous standard of review when it held (Pet. App. 25, quoting from *Condor Operating Company* v. *Sawhill, supra,* 514 F. 2d at 359), "[w]here the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary by a recognized emergency * * *, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate." Petitioner claims to perceive a difference between that standard and the standard set forth in the Administrative Procedure Act, 5 U.S.C. 706(2), and the review provisions of Section 5 of the Allocation Act, 15 U.S.C. (Supp. V) 754.

There is no difference. It is a fundamental principle of administrative law, articulated in innumerable cases, that an administrative regulation designed to effectuate a statutory objective is valid if there is a discernible rational basis for the agency's action. See, *e.g., Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286; Davis, *Administrative Law Treatise*, §30.05 (1970 Supp.). Agency action that has a rational basis by definition is not arbitrary, capricious, or an abuse of discretion. As the Court said in *Bowman Transportation, Inc.*, "we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." 419 U.S. at 290. In short, there is no substance to petitioner's objection to the court's phrasing of the standard of review.[5]

2. Although petitioner alleges that the regulation will prevent it from remaining in the crude oil marketing business (Pet. 17-18), it does not address or refute the court of appeals' reasons for concluding the regulation is a lawful exercise of the Administrator's delegated authority.

As the court noted, the Emergency Petroleum Allocation Act of 1973 provided broad authority to the President and

[5]Similarly, there is no basis for petitioner's contention (Pet. 16) that the court erroneously changed the standard of review from its earlier opinion, vacating the preliminary injunction, in which the court indicated that "any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances" (Pet. 6). Although we know of no rule of administrative law requiring an agency to advance compelling circumstances to sustain an otherwise rational regulation, the final decision of the court below reflects a critical scrutiny and identifies compelling circumstances justifying the supplier-purchaser regulation. Moreover, as the court below stated (Pet. App. 25, n. 4), the court's earlier statement was "dictum * * * made without the benefit of a full justification by FEA of its actions, and certainly cannot be interpreted as calling for a change in the standard of review of administrative action."

his delegates to allocate petroleum products and otherwise deal with the imminent and severe shortages in those products. The Act provided that regulations were to serve nine general objectives "to the maximum extent practicable," 15 U.S.C. (Supp. V) 753(b)(1), and thus, as the court stated (Pet. App. 27), "indicate[d] that a considerable degree of flexibility was intended by Congress and was incorporated into the Act." Indeed, the legislative history of the Act demonstrates that Congress encouraged adoption of a supplier-purchaser freeze rule. The conference report on the bill, H. R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 24 (1973), stated: "It is expected that the President's regulation will in most cases merely confirm existing supply relationships." See also S. Rep. No. 93-159, 93d Cong., 1st Sess. (1973); H. R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973).

The freeze rule adopted is a reasonable means of achieving the objectives specified in the Act. As the court below stated (Pet. App. 28), "[i]t is uncontested that the supplier-purchaser rule stabilizes the distribution system and greatly helps to protect the sources of supply of the small, independent refiners" and thus enables small refiners to maintain their competitive viability in the industry.[6] Moreover, the court noted that the "substantial exceptions" to the rule "demonstrate an attempt by FEA to aid the new resellers, without harming the refiners" and "further support[] the reasonableness of FEA's approach" (Pet. App. 32-33).

[6]The district court expressed the view that the existing "buy-sell" program (10 C.F.R. 211.65) was adequate to protect small refiners without the supplier-purchaser freeze rule (Pet. App. 16). But the court of appeals correctly sustained (Pet. App. 30-32) as reasonable the Administrator's conclusion that the buy-sell program, which requires the monitoring of innumerable individual transactions, could not provide effective protection in the absence of the freeze rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
STANLEY D. ROSE,
BRUCE G. FORREST,
Attorneys.

JULY 1977.

DOJ-1977-07

APPENDIX

Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, as amended, 15 U.S.C. (Supp. V) 751 *et seq.*

P.L. 93-159, November 27, 1973

As amended by P. L. 93-511, P. L. 94-99, P. L. 94-133, P. L. 94-163, P. L. 94-385.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Emergency Petroleum Allocation Act of 1973."

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

– – –

MANDATORY ALLOCATION

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d), such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

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10 C.F.R. 211.63 (1974), 41 Fed. Reg. 24340-24341 *Domestic crude oil supplier/purchaser relationships.*

(a) *Scope.* This section provides for the allocation of crude oil produced in the United States other than crude oil which is the subject of (1) purchases and sales made to comply with 211.65 of this subpart; (2) sales of crude oil made pursuant to Parts 225 and 225a, Chapter II of Title 30 of the Code of Federal Regulations; (3) the first sale of crude oil under 10 U.S.C. 7430(b), as amended by 201 of the Naval Petroleum Reserves Production Act of 1976; and (4) the first sale of any domestic crude oil produced and sold from a property from which domestic crude oil was not produced and sold prior to January 1, 1976.

(b) *General rule.* (1) All supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976 shall remain in effect for the duration of this program; *Provided, however,* that any such supplier/purchaser relationship to which this section is applicable may be terminated as provided in paragraph (d) of this section.

(2) Once any first sale, purchase or exchange of domestic crude oil is made which is exempt from this rule pursuant to paragraph(a)(4) of this section, or once the sale, purchase or exchange of any domestic crude oil that has at any time been the subject of a supplier/purchaser relationship under paragraph (b)(1) of this section is made in accordance with this section to a firm that was not the purchaser thereof on January 1, 1976, or has not continued to purchase that crude oil without interruption since December 31, 1975, a supplier/purchaser relationship between the seller and purchaser shall be established thereafter under this section as though it had been in effect on January 1, 1976.

(3) The provisions of this paragraph (b) shall not (i) operate to validate any supplier/purchaser relationship in effect on January 1, 1976 where the purchaser of the domestic crude oil involved was not the lawful purchaser thereof under the provisions of this section as in effect at any time prior to February 12, 1976, or (ii) impair any purchaser's rights under this section as in effect prior to February 12, 1976, including a purchaser's right to continue to receive the volumes of domestic crude oil flowing to it on December 1, 1973 or such later date at which its supplier/purchaser relationship was established under this section as in effect prior to February 12, 1976.

(c) *Supply obligations and purchase rights.* (1) Obligations and rights incident to supplier/purchaser relationships under this section applicable to domestic crude oil production from a property (as defined in Part 212) in a given month shall not exceed the actual production of that property for the month.

(2) Where the volume of domestic crude oil produced by a property in a given month is below December 1975 levels, the supply obligations under this section for that production shall be reduced for that month as to each January 1, 1976 purchaser of that production on a pro-rata basis, based on the respective volumes purchased by each such purchaser in December 1975.

(3) Increased production of domestic crude oil from a property over December 1975 production levels shall be sold proportionately to the same purchaser or purchasers that are entitled to purchase the December 1975 levels of domestic crude oil production of that property under this section.

(4) In the event that a property which produces crude oil subject to this section is transferred to a new owner, the obligation to supply the January 1, 1976 purchasers of that property's crude oil production shall attach to the new owner and new supplier/purchaser relationships subject to this section shall be established on that basis.

(5) In the event that a refinery to which crude oil subject to this section is supplied is transferred to a new owner, the right to purchase such crude oil shall for purposes of this section be transferred to the new owner of the refinery and a new supplier/purchaser relationship subject to this section shall be established on that basis.

(d) *Termination of supplier/purchaser relationships.*

(1) Any supplier/purchaser relationship established under paragraph (b) of this section may be terminated as follows:

(i) At the option of the purchaser, as evidenced by its written consent thereto together with notice of the termination date given to the producer, provided all subsequent purchasers of the crude oil involved have consented to such termination in writing;

(ii) By a producer with respect to any crude oil produced from a stripper well lease (as defined in 212.74 of Part 212 of this chapter), provided that the production from a stripper well lease is upon termination immediately sold or sold for resale to any small refiner and continuously thereafter supplied to that small refiner purchaser for processing by that small refiner; and

(iii) By a producer (as defined in Part 212 of this chapter), if the present purchaser as to any old, new or stripper well lease crude oil (as defined in 212.72 and 212.74 of Part 212 of this chapter) refuses, within a fifteen day period after receipt of written notice as to that offer from the producer, to meet any bona fide written offer made by another purchaser to purchase such crude oil at a lawful price above the price paid by the present purchaser.

(iv) By a producer (as defined in Part 212 of this chapter) or reseller as to a reseller purchasing from it, *Provided, that:*

(A) At least forty-five days in advance of any termination under this clause (iv), the producer or reseller shall give to a reseller purchasing from it whose supplier/purchaser relationship is proposed to be terminated a written termination notice stating the date of termination, the source and estimated volume of crude oil involved (including the portion of that volume that is priced as lower tier crude oil under Part 212 of this chapter), and the name and address of the new reseller to which such crude oil is proposed to be sold;

(B) Any reseller that has received a termination notice from a producer or reseller as provided in subclause (A) of this clause, which proposed termination would effect a reduction in deliveries of crude oil to any refiner shall, within 15 days thereafter, provide a copy of that notice to any such refiner and advise the proposed new reseller as to the identity of the refiner or refiners to which copies of the termination notice were so provided;

(C) The refiners notified under subclause (B) above shall be those refiners that received, either directly or through exchanges, the crude oil involved in the termination, and, if the crude oil involved in the termination is commingled with other crude oil and cannot be traced directly to a particular refiner, all refiners receiving crude oil from the commingled inventory shall be so notified;

(D) The proposed new reseller of that crude oil shall obtain from the refiner or refiners that received a copy of the termination notice their written consent to the proposed supplier substitution, except as provided in subclause (F) below;

(E) Any consent of a refiner under subclause (D) above may be upon such terms and conditions as shall be agreed

upon between the parties, provided such terms and conditions are consistent with the provisions of Parts 211 and 212 of this chapter;

(F) The consent of a refiner required under subclause (D) shall not be necessary to effect a termination if (I) the proposed new reseller offers to supply the crude oil involved in the proposed termination to that refiner and (II) the transportation and handling charges for that crude oil involved agreed to by the proposed new reseller with the refiner do not exceed the transportation and handling charges to the refiner for that crude oil of the reseller whose supplier/purchaser relationship is proposed to be terminated;

(G) If a refiner is unable to determine the exact amount of the transportation and handling charges attributable to the crude oil involved in the proposed termination so that the refiner may make a determination as to whether the transportation and handling charges of the proposed new reseller do not exceed the transportation and handling charges of the present reseller for the particular crude oil involved, the refiner shall within ten days request the amount of these charges from the reseller whose supplier/purchaser relationships is proposed to be terminated;

(H) Upon request of a refiner in accordance with subclause (G) above, any reseller whose supplier/purchaser relationship is proposed to be terminated as to crude oil supplied to that refiner shall supply within ten days to that refiner the amount of the transportation and handling charges of that reseller for the crude oil involved in the proposed termination; and

(I) The provisions of this clause (iv) shall not permit any refiner to terminate or consent to the termination of a crude oil supplier/purchaser relationship if the termination would result in that refiner, or any affiliated entity, becoming the new purchaser of the crude oil involved, whether directly or through exchange.

(2) Nothing in this paragraph (d) shall be construed as authorizing any firm to terminate a supplier/purchaser relationship in breach of a contract or agreement it may have with another firm.

No. 76-1555

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

BASIN, INC., *Petitioner*

vs.

FEDERAL ENERGY ADMINISTRATION, *Respondent*

Reply Brief

CECIL E. MUNN
1800 First National Bank Building
Fort Worth, Texas 76102

NORTHCUTT ELY
Watergate Six Hundred Building
Washington, D.C. 20037
Counsel for Petitioner

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The district court, on the basis of detailed findings of fact made from carefully considered evidence, found the regulatory freeze out of all new competition to be "arbitrary, capricious and an abuse of discretion". TECA reversed *because*, it said, the district court had applied the wrong standard in evaluating the FEA regulation. Now the Solicitor General asks this Court to allow that reversal to stand on the curious ground that "there is no difference" between the standards applied by the two courts below.

The argument is the logical equivalent of an optical illusion. It leaves the reader shaking his head in disbelief.

There is a vast difference between what the Solicitor General says that TECA held and what TECA itself said it was holding. If the Solicitor General's sum-

mary were correct, the appropriate TECA action would have been to affirm — not reverse — the district court.

By this Reply we hope to put the case back into perspective.

The core issue here is one of mounting national importance. Is the procedure for judicial review of administrative action a meaningful right or merely a token gesture?

The District Court

The regulation in question is a total lockout of new competition. The district court so found:

> "If the freeze rule as presently constituted remains in effect, in all likelihood, Basin will be *forced out of business*, and the entry of *any* newcomer into the crude oil marketing business will be effectively foreclosed." (App. 16).

On its face such an iron curtain would appear to be quite at odds with declared national policy. Speaking on the floor of the Senate with reference to the Preliminary Injunction in this very case, Senator Moss proclaimed the national gravity of what the FEA has done (Cong. Record Dec. 22, 1975, S22395):

> "One would think that the antitrust laws had never been enacted. FEA has apparently never heard of them or the 'priority needs to foster and and preserve competition' that Congress wrote into FEA's organic act. The District Court, in enjoining enforcement of Section 211.63 of the regulation was conservative in characterizing that regulation as 'questionable.' This regulation .... is plainly in conflict with the intent and will of Congress."

Deputy Administrator John A. Hill — the number two man in the FEA[1]—explained in his testimony in the district court that the freeze had only been considered acceptable in the first place as a very short-lived temporary measure:

> "Q You were willing to accept the regulation which had that effect at the time because you thought you were dealing with a *very temporary* regulatory program, one I believe you said you contemplated would not last more than four to six months?
>
> "A That is correct. We contemplated a program to last *only* during the period of the embargo and it was our estimate at the time that the embargo probably would not last beyond six months." (R 192)
>
> . . .
>
> "Q Does the FEA consider that it would be *just* —to freeze all new market entrants out of the crude oil marketing business indefinitely?
>
> "A I think as a general rule we would consider that to be **an inappropriate and absurd energy policy."** (R 194).

[1] Administrator Zarb was invited to appear as FEA spokesman but he deferred to Hill. Counsel for the FEA explained, "There is no suggestion that Mr. Zarb has sufficient knowledge to add to this particular case. Mr. Hill is the person selected out. His deposition is before the Court and its indications. In what he said, *we are fully bound.*" (R 642-3).

To deprive all newcomers permanently — or indefinitely — of the right to compete is certainly arbitrary unless there is an inescapable necessity for such a drastic anticompetitive restraint. The first TECA panel concluded that the lockout was not rational in the absence of a showing of compelling circumstances:

> "Certainly, any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified *only* by a clear showing of compelling circumstances." (App. 6).

The Solicitor General argues, ". . . . we know of no rule of administrative law requiring an agency to advance compelling circumstances to sustain an *otherwise rational* [sic] regulation." Opp.Br. 6 n.5. The point is that the first TECA panel had held that the lockout was *not* "otherwise rational" unless justified by compelling circumstances. And it remanded the case to the district court to hear evidence and determine whether any such compelling circumstances in fact exist.

Both sides presented evidence. The district court made detailed fact findings from that evidence.

The Solicitor General reargues the *factual* findings made against the FEA. His Brief in Opposition (p. 7) quotes the completely erroneous statement in the TECA opinion from which certiorari is sought that "it is uncontested that the supplier-purchaser rule stabilizes the distribution system and greatly helps to protect the sources of supply of the small, independent refiners.". In fact that assertion was hotly contested.

The evidence showed it to be completely false. And the court that heard that evidence simply found the facts against that assertion:

> "There are no compelling circumstances justifying the effect of 10 C.F.R. §211.63 in effectively eliminating relatively recent comers — including Basin — from the crude oil marketing business. Neither the problem of layering nor the problem of assuring small independent refiners adequate supplies of crude oil constitute compelling circumstances justifying the existence of 10 C.F.R. §211.63." (App. 17).

Of course, it is reasoning in a circle to argue that a regulation which freezes a supply into historical purchasers is shown to be justified because it freezes the supply into those purchasers. The contention that a freeze out of all new competition from the crude oil marketing industry is necessary to permit existing independent refiners to compete simply did not stand up under an evidentiary review. The district court's considered rejection of that attempted justification has since been reenforced by an identical conclusion from the *Presidential Task Force on Reform of Federal Energy Administration Regulations* under the co-chairmanship of the FEA Administrator himself. Pet. 10.

The Solicitor General also argues that "the 'substantial exceptions' to the rule 'demonstrate an attempt by FEA to aid the new resellers, without harming the refiners' and 'further support the *reasonableness* of FEA's approach'." Opp.Br. 7. But saying so

does not make it so! This again presents a fact issue decided against the FEA on ample evidence. A glance at a few highlights from that evidence is not out of place in this reply for it illustrates why, in today's atmosphere of massive administrative regulations, meaningful judicial review is so terribly important to the preservation of a government of laws.

In November of 1975 — while the *first* appeal to TECA was pending — the FEA hastily amended the freeze regulation and represented to TECA that the regulation as amended was at last workable to permit "the substitution of new resellers [marketers] of crude oil for present resellers. . . .". App. 3. Basin contended that "this formal broadening of . . . access to producers [was] practically meaningless." The first TECA panel held, "we view this as involving relevant questions of *fact* . . . ." and remanded to the district court to make those determinations. (App. 4).

The district court received evidence on those questions. FEA's witness Paige — the one man who wrote the amended as well as the original lockout regulation — conceded in his testimony that FEA now recognized that "the regulation we had adopted in November of '75 was *not* really workable." (R 513 and 680).

Paige had since again rewritten the regulation and this time had created an unbelievable obstacle course against new competitors. He imposed upon a new marketer, as a condition of access to supply, the obviously impossible requirement of obtaining the advance unanimous consent of all ultimate refiners who re-

ceived any part of each barrel of oil — characteristically commingled — which the new marketer sought to purchase. Witness his actual testimony (R 632):

"Q Suppose part of the people consent and part don't. Are we free to buy the oil or not?

"A If you follow the approach in Option 1 that Basin has under this proposal, it would appear that the consent of *all* of the refiners is required.

"Q Has to be unanimous, doesn't it?

"A Yes. Under Option 1, I would like to stress.

"Q That's correct. We will get into Option 2 in a moment.

"A Okay.

"Q So *unless Basin could get the consent in this case of at least 19 different people, then it could not make this purchase that had been agreed upon by both seller and buyer, could it?*

"A Under Option 1, *they could not.*

"Q All right. Now let's turn to Option No. 2. What is that?

"A Option 2, basically provides that Basin would not have to obtain the consent of any of the refiners if it offered to supply — continued to supply the crude oil to the refiner or refineries, the identity of which Basin has been advised.

"Q How much crude oil to each refiner?

"A The regulation contemplates the same flow to the refiner that existed prior to the termination.

"Q Which, of course, means that Basin must know how much of the volume from this

lease goes to each individual refiner? Right?
"A Yes. I think that's correct.
"Q How is Basin to determine that?"

Paige had no satisfactory answer to that last question. The evidence showed that even the refiners themselves could not determine that. So FEA's Paige — still determined to justify the regulation he had written — testified that the new marketer could obtain the necessary information from the FEA's Regional Office (R 648):

"Q Give mve the name of that man that I am supposed to contact.
"A It would be at the Dallas Regional Office.
"Q Mr. Fowler?
"A He is the Regional Administrator.
"Q How in the world is he going to know?
"A Well, he would find out and attempt to make the regulation work for you."

This was demonstrably false. The subsequent record testimony showed that Basin had in fact gone to the FEA Regional Office for that information and received this polite rejection from the Regional Administrator (R 1181):

> "He was very courteous and very considerate but all of his answers were negative. He said that the FEA did not have that information. He said that they would not attempt to get it for us and, even if they did have it, it would be of a proprietary nature, consequently classified, and consequently they couldn't furnish it to us if they had it."

Some of Paige's testimony even cast doubt on the FEA's good faith (R 657):

"Q . . . Is is true . . . that you *deliberately* wrote into this regulation a condition which you knew would be *impossible* to meet?
"A I think in certain situations it would be impossible to meet. I said that before, yes.
"Q And you deliberately wrote it that way, did you not?
"A Yes.
"Q There was no accident; right?
"A Yes, that's correct."

That is illustrative of the *type* of evidence before the reviewing district court. The fact findings were against the FEA, culminating with a finding that "none of these amendments to the freeze rule have meaningfully broadened Basin's access to crude oil supplies'" (App. 15-16).

Applying the *statutory* standard of review[2], from the ample and thoroughly considered evidence which, in response to the first TECA mandate, had been adduced by both the citizen and the agency, the district court made the ultimate determination:

> "10 C.F.R. §211.63 is arbitrary, capricious, and an abuse of discretion in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so and in that it does not, as to such new market entrants, constitute an allocation of crude oil but is rather a total denial of access to

[2]Administrative Procedure Act, 5 USC 706(2); Economic Stabilization Act of 1970, 12 USC 1904 note, §211(d)(1) quoted in full in Pet. 3.

> crude oil to them and is unlawfully discriminatory as to the Plaintiff and any other new market entrant." (App. 18).

The judicial review was thorough, objective and meaningful. The review standard was as prescribed by statute and the relief granted was that which the statute mandated.

The TECA Reversal

The second TECA paned did *not* challenge the sufficiency of the district court's findings nor of the evidence to support them. Nor did it deny that the district court had faithfully followed the mandate of the first TECA panel. Rather it reversed because it disapproved of the mandate of the first TECA panel and of the standard of review employed by the district court:

> "Of critical importance to this case is *what standard the trial court should have applied* in evaluating the FEA's regulation. This Court concludes that the regulation should have been upheld if it had any rational basis to support it." (App. 23).

The very heart of TECA's reversal is its erroneous conclusion that the standard of review applied by the district court (and prescribed by statute) was different from the standard which the second TECA panel would have applied and hence was wrong. Yet the Solicitor General argues that "*There is no difference* . . . Agency action that has a rational basis by definition is not arbitrary, capricious or an abuse of discretion." Opp. Br. 6. If that be so, then the converse would also be true. Agency action which has been determined to be arbitrary, capricious and an abuse of discretion by definition does *not* have a rational basis. And the district court's action should therefore have been affirmed.

The Solicitor General is equally unsound in asking this Court to accept the earlier decision in *Condor Operating Company v. Sawhill*, 514 F.2d 351 (TECA 1975), cert. den. 421 U.S. 976 as foreclosing review here. That case involved only the issue of whether a producer was entitled to refine his own crude oil or whether he could be compelled to continue selling it to the major company refiner (Phillips Petroleum Company) that had been taking it. The question was *who* the producer could receive his money from — not, as here, whether a company was entitled to engage in business.

Moreover, *Condor* was cited in the first TECA opinion (App. 3) which remanded the case for a full judicial review and ordered an "expedited hearing" (App. 7). If *Condor* were dispositive, that order would have been a cruel and idle gesture.

The Solicitor General says, "petitioner *alleges* that the regulation will prevent it from remaining in the crude oil marketing business." Opp. Br. 6. That is no mere allegation. It is a judicially determined fact (App. 16) accepted by TECA — *with a holding that it makes no difference* (App. 33):

"We do not overturn the district court's finding that new entrants to the business are foreclosed.

. . .

"Basin may engage in any other lawful activity."

It is little comfort for a court to tell petitioner that it "may engage in any *other* lawful activity" — like lifting a lawyer's license with the consolation that he is free to enter the real estate business. The lack of realism is reminiscent of the callous response attributed to Marie Antoinette, "If they have no bread, let them eat cake." See Pet. 9 n. 6.

The evil of the regulatory lockout is compounded by the fact that, as the handy work of one man, it was suddenly imposed in the first place "without any published intention to do so" — no attempt to comply with the notice requirements of the Administrative Procedure Act. (App. 10).

The decision of the second TECA panel vests in FEA the power to put one small company out of business and to keep all other new competition out — forever. That ruling is so frightening and so far reaching that it surely merits a higher review by this Court.

Conclusion

We are mindful and respectful of this Court's busy docket. We recall Judge Shirley N. Hufstedler's observation in her scholarly paper "Courtship and Other Legal Arts", 60 ABA Journal 545, 546-7 (May 1974):

> "The Supreme Court now hears fewer than 1 per cent of the cases decided by the federal courts of appeals . . . Courts of appeals can be neither right nor harmonious 99 per cent of the time."

Yet this Court has often considered issues of far less concern to an ordered system of justice than the issue involved here. And if courts of appeal can not be right 99 per cent of the time, *a fortiori* neither can the FEA.

If any court of appeals ever *needed* the benefit of judicial supervision it is the understaffed and overworked Temporary [sic] Emergency Court of Appeals which has the *exclusive* intermediate appellate say over one of the most pervasive and active areas of administrative action in America today.[3]

Respectfully submitted,

CECIL E. MUNN
1800 First National Bank Building
Fort Worth, Texas 76102

NORTCUTT ELY
Watergate Six Hundred Building
Washington, D. C. 20037
Counsel for Petitioner

[3] Cf. the public comments of the Chief Justice of the United States quoted at Pet. 15.